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ABSTRACT

Intended to serve as reference materials for discussions with teaching faculty and other members of the university community, this paper and its attachments provide guidelines for members of the Association of Research Libraries (ARL) on fair use and the classroom and library photocopying provisions of the Copyright Act of 1976 (PL 94-553). Factors involved in determining whether a particular use is a fair use of a copyrighted work are outlined. The provisions of the 1976 "Classroom Guidelines" are reviewed and described as unsuitable in the context of postsecondary education. Also outlined are issues related to the reproduction of musical works, copying for reserve room use, and the "umbrella" statute recommended by the Association of American Publishers (AAP). Attachments include a briefing paper for librarians and archivists on current issues in library photocopying and copyright and a University of Wisconsin-Madison policy statement on photocopying for teaching and research, which is suggested as a model for other universities. The policy statement covers copying which is completely unrestricted, copying which is permitted, copying for which teachers should obtain permission, and publishers' guidelines for making multiple copies for classroom use. Information on how to obtain permission for copying and a sample letter requesting such permission are also provided. (ESR)

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Reproduction of Copyrighted Materials for Classroom Use

A Briefing Paper for Teaching Faculty and Administrators

Prepared by the
Association of Research Libraries

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Statement of Purpose

Recent litigation involving New York University, a letter from the Association of American Publishers (AAP) to colleges and universities about the settlement reached in that case and a report on library photocopying by the Register of Copyrights have focused attention on the fair use and library photocopying provisions of the Copyright Act of 1976 (PL 94-553). The Register's report deals largely with library photocopying, while the NYU case and the AAP letter are concerned primarily with fair use and the practices of faculty members copying materials for classroom use.

The settlement agreement and, to an extent, the Register's report take a restrictive view of fair use and section 108 photocopying rights, which if uncritically adopted as guides may inhibit current lawful practices and impinge unnecessarily upon the rights of scholars and librarians. The Register's Report represents one viewpoint, which has been rebutted by the American Library Association (ALA Washington Newsletter, July 7, 1983). The AAP letter of June 10, 1983 seeks to extend the out-of-court settlement with NYU to other colleges and universities, by suggesting that it be universally adopted. That settlement need not be a model for others. In the view of the ARL, the attached policy of the University of Wisconsin-Madison is a better guide to what is permissible and appropriate in the context of higher education.

Given the significantly different interpretations of fair use and library photocopying rights that currently exist, and the fact that those differences are not likely to be resolved in the near future, the ARL offers the following as guidance for its members. This memorandum and its attachments are intended to serve as reference materials for discussions with teaching faculty and other members of the university community regarding the use of copyrighted materials.

Copyright Law

The owner of the copyright of a copyrighted work has the exclusive right to reproduce and distribute the work. It is important to be aware that the law applies even to material distributed free to students. The course instructor is responsible for copying done at his or her request, even if an off-campus copy center makes and distributes the copies.

The copyright owner's exclusive reproduction and distribution rights are, however, subject to important exceptions. The fair use exception in section 107 of the Copyright Act permits copying without the owner's permission for purposes such as criticism, comment, scholarship, research, or teaching, and authorizes the making of multiple copies for classroom use. The library photocopying exceptions in section 108 authorize the making of single copies of certain works or parts of works in specified circumstances.

The determination whether a particular use is a "fair" use of a copyrighted work requires consideration of the following four factors:

(a) the purpose and character of the use;

(b) the nature of the copyrighted work;

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(c) the amount and substantiality of the material used in relation to the copyrighted work as a whole; and

(d) the effect of the use on the potential market for or value of the work.

Assessment of what is and what is not fair use is made on a case-by-case basis. The following points, however, provide some flesh for the bare bones of the statutory criteria.

Purpose and character of the use. A finding of fair use is more likely if:

(1) the use of a copyrighted work is for a nonprofit educational purpose, rather than a commercial purpose (however, a nonprofit educational purpose does not ensure absolutely that the use is fair);

(2) no charge is made for the copies; and

(3) the original and the copy do not serve the same function.

Nature of the copyrighted work. A finding of fair use is more likely if the copyrighted work is:

(1) a compilation of facts or information rather than a creative or imaginative work:

(2) out of print or unavailable for purchase through normal channels;

(3) not a consumable work (such as a workbook);

(4) not intended for performance or public exhibition (such as a musical score); or

(5) a newspaper or periodical (but not a newsletter) containing articles of current interest.

In the context of classroom use, copying from textbooks and other materials prepared primarily for the educational market is less likely to be considered fair use than is copying from materials designed for general public distribution.

Amount and substantiality of the material used in relation to the copyrighted work as a whole. Both the quantity (the amount copied) and the quality (the importance of the portion copied) of the use must be considered. A finding of fair use is more likely if the material copied:

(1) is a small portion of the total work; and

(2) does not contain a substantial amount of the essence or principal elements of the work.

Effect of the use on the potential market for or value of the work. A finding of fair use is more likely if the use:

(1) does not supplant a portion of the market for the work; or

(2) stimulates sales of the work.

Permissible Copying and Recommended Procedures for Classroom Use Copying

No court has yet addressed the application of the fair use exception to photocopying in the university context. However, in general and subject to any considerations listed above (such as the limitation on fair use where consumable materials are involved) that may be applicable in particular cases, it appears that faculty members would be in compliance with the law if: (1) the copies themselves or other copies of the same works or portions of works are not used repeatedly, i.e., the faculty member has not used them in preceding classes and does not intend to use them in subsequent classes; (2) no more than one copy is made for each student; (3) a notice of copyright is included on each copy distributed; (4) students are not charged a fee beyond the actual cost of reproduction; and (5) in the case of longer materials, the portion copied is selective and sparing in relation to the whole work.

The right to make copies for classroom use is more limited if use of the copies will have a direct adverse effect on the potential market for the work, or if the permission of the copyright owner was not sought when the decision to copy was made with sufficient lead time to allow for the making of such request.

Guidelines

An agreement negotiated in 1976 by the Ad Hoc Committee on Copyright (a group of 39 education organizations), the Association of American Publishers (AAP), and the Authors League of America lists specific, quantitative standards for minimum (but not maximum) fair use copying, including both single copying by teachers and multiple copying for classroom use. In spite of the express statement that the agreement does not identify the outer boundaries of fair use, some publishing interests contend that permission must be obtained for any copying in excess of the numbers covered by the standards. The agreement, commonly referred to as the "Classroom Guidelines," restricts the copying of any poem longer than 250 words or the copying in full of any prose work longer than 2,500 words (although 10% of any longer prose work could be copied up to a maximum of 1,000 words). The guidelines also state that not more than one photograph or diagram should be copied from any single book or periodical article, that the decision to copy should be a spontaneous one (for example, where an article has just appeared that relates to subject matter being covered in a current course), and that no anthologies or collective works should be created by means of copying. These standards were incorporated into the recent out-of-court settlement between several publishers and New York University. (The Classroom Guidelines may be found in U.S. House of Representatives Report No. 94-1476, pp. 68-70.)

The minimum standards in the Classroom Guidelines in many respects appear unsuitable in the context of postsecondary education. It would be difficult and costly for a college or university that offers several hundred (or several thousand) courses to monitor compliance with the guideline that a particular work be copied for only one course. Similarly, it is unreasonable to require that no more than one work (or excerpt) be copied from the same author during one class term, when entire college courses may be

devoted to the works of one author. The brevity guidelines, e.g., excerpts of prose works must not exceed 1,000 words, also are too stringent for college-level courses. Therefore, it is particularly important to understand that libraries and professors are not necessarily confined to the copying endorsed by the Classroom Guidelines. Rather, a judgment must be made in each case based upon the factors listed in section 107.

The American Association of University Professors and the Association of American Law Schools dissented vigorously from the Classroom Guidelines on the grounds that the provisions were too restrictive in the college and university context. The American Library Association (ALA) has developed a model policy for classroom, research, and library reserve use of copyrighted materials. This policy provides a more realistic approach to a university's need to disseminate meaningful and current information in its instructional program than do the arbitrary quantitative standards proposed by the Ad Hoc Committee/AAP/Authors League guidelines. The ALA model policy was published in the ALA Washington Newsletter (April 23, 1982) and in C&RL News (April 1982). A number of universities have developed institutional policies based on the ALA model. One example, from the University of Wisconsin-Madison, is attached.

Musical Works

A library's right to reproduce musical works derives from section 107 fair use rights because section 108 rights do not extend to musical works, except for copies made for archival or replacement purposes.

Music educators and publishers have developed guidelines to identify minimum standards of educational fair use of music, which provide that for academic purposes other than performance, multiple copies of excerpts of up to 10% of works may be made, so long as the excerpts do not comprise a performable unit of a work. These guidelines may also be found in House Report No. 94-1476, pp. 70-71. As with the other guidelines, the music guidelines do not identify the outer limits of fair use.

Copying for Reserve Room Use

The Copyright Act does not specifically address copying for reserve room use. However, in appropriate circumstances, libraries lawfully may make single copies of copyrighted works at the request of faculty members for reserve room use under: (1) the fair use provision of section 107; (2) section 108(d), which authorizes libraries to make single copies of an article or a small part of other copyrighted works; or (3) section 108(e), which grants libraries the right to copy all, or a substantial part, of a work if a copy cannot be obtained at a fair price. The section 108(d) and (e) exceptions require (among other things) that the copy become the property of the user. It therefore is recommended that the copy be returned to the requesting faculty member at the end of the semester.

When a faculty member asks a library to make available multiple copies of a copyrighted work for reserve room use, the determination of whether or not the library lawfully may comply with the request depends upon whether or not the use is within section 107. Section 107 recognizes that fair use includes the making and distribution of multiple copies for classroom use, and does not limit that right to teachers. Inasmuch as the reserve room is an extension of the classroom, the standards for permitted copying for classroom use fairly may be read to apply to reserve room use as well.

"Umbrella" Statute

The AAP has recommended adding a new provision to the Copyright Act that would limit the remedies available for infringement of copyright in scholarly, scientific, and technical (SST) journals, business periodicals, and conference proceedings to an assessment of a reasonable copying fee (thus precluding injunctive relief, actual or statutory damages, lost profits, and impoundment) if the user is and the copyright owner is not registered with the Copyright Clearance Center or another qualified licensing system. The draft legislation, commonly referred to as the "umbrella" statute, contains a number of conditions, including that the copy be used for research and study, and that it contain a notice of copyright. The Register of Copyrights supports the principle of the proposal, although he has expressed concern about the copying prices that might be established by licensing systems.

The principal effect of such a statute would be to pressure publishers and users to join private royalty collection organizations. It also would be likely to have a chilling effect on the exercise of fair use rights.

Attachments

1. Current Issues in Library Photocopying and Copyright: A Briefing Paper For Librarians and Archivists, Association of Research Libraries.

2. Guidelines for Photocopying for Teaching and Research, University of Wisconsin-Madison.

3. Scholarly Journal Publishing and Library Photocopying: Economic Issues Bearing on Copyright, American Library Association.

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Attachment 1

Current Issues in Library Photocopying and Copyright

A Briefing Paper for Librarians and Archivists

Prepared by the
Association of Research Libraries

The release of the Register of Copyrights' first five-year report on the library photocopying provisions of the Copyright Act of 1976 and recent highly publicized lawsuits by publishers challenging the photocopying practices of New York University and some of its faculty (which has now been settled), off-campus copy services, and a few large business corporations have raised anew questions regarding the bases and extent of the rights of libraries to make and distribute photocopies of copyrighted works without copyright liability. This briefing paper provides information and guidance regarding these issues.

Statutory Bases of Library Photocopying Rights

Section 107. Prior to enactment of the 1976 Copyright Act, courts recognized that the exclusive rights of copyright proprietors with respect to the reproduction of their works did not extend so far as to preclude fair use by others. In the Williams & Wilkins case, decided in 1973, the U.S. Court of Claims (now merged into the U.S. Court of Appeals for the Federal Circuit) confirmed that the doctrine of "fair use" applied to library photocopying, including the provision of photocopies in lieu of interlibrary loans. It held that the photocopying practices of the National Library of Medicine (NLM) challenged by Williams & Wilkins, the plaintiff medical journal publisher, which included the copying of journal articles in their entirety, were fair use.

In reaching that conclusion, the court found it important that the Library had reasonably strict policies that limited copying. Specifically, NLM had generally restricted (1) making more than one copy of a journal article in response to an individual request, (2) copying more than 50 pages of an article, or (3) copying more than one article from a journal issue. Not more than 20 requests from an individual (30 from an institution) per month were honored.

Congress incorporated the judicial doctrine of fair use into section 107 of the 1976 Act without intending to change, narrow, or enlarge it in any way. Section 107 states that a "fair" use may involve reproduction by copying, including multiple copies for classroom use.

Section 108. At the urging of libraries, who wanted their historic rights recognized with more certainty than section 107 afforded, Congress incorporated in section 108 specifically delineated rights for libraries to reproduce and distribute copyrighted works. Section 108 expressly states, however, that it in no way affects the section 107 right of fair use. Section 108 rights are not exclusive, and a library may have copying rights available under section 107, in addition to its rights under section 108. Thus, depending upon the circumstances, a library may have photocopying rights under section 107 that are more extensive than those specified in section 108. The right to make multiple copies for classroom use where all section 107 conditions are satisfied would be one example.

Section 108 rights do not apply to musical, pictorial, graphic, or sculptural works, or to motion pictures or other non-news audiovisual works, except that libraries may reproduce such works for archival or replacement purposes.

Conditions Imposed by Section 108

The following conditions must be satisfied if reproduction or distribution of a copyrighted work is to fall within section 108: (1) the reproduction or distribution must be made without any purpose of commercial advantage; (2) the collection of the library must be open to the public or, at the least, to persons not affiliated with the institution who are doing research in a specialized field; and (3) the reproduction or distribution must include a notice of copyright.

The notice requirement has been the subject of dispute, with some publisher interests arguing that the notice required is the statutory notice of copyright, where one is published with the work. However, Congress knew how to refer to the statutory notice when that was what it meant (see, e.g., section 405, Copyright Act of 1976) and it knew of the serious administrative burdens that a requirement to locate and reproduce the statutory notice would impose. Moreover, the statutory notice lost much of its significance in the new Act. Therefore, it is more reasonable to conclude that something short of duplication of the statutory notice was intended.

This interpretation is supported by an agreement on multiple copying for classroom use negotiated in 1976 by the Ad Hoc Committee on Copyright (a group of 39 education organizations), the Association of American Publishers (AAP), and the Authors League of America. This agreement, commonly referred to as the "Classroom Guidelines," requires only that each copy include a notice of copyright, such as the notice that is commonly placed on the copying plate of library photocopying machines.

Musical Works

A library's rights under section 108 do not extend to musical works, except for archival or replacement purposes. The Music Library Association and Music Publishers Association have proposed an amendment to section 108, which the Register of Copyrights endorsed in his January 1983 report to Congress, that would allow a library to make and distribute a single copy of a musical work if a copy cannot be obtained at a fair price and, following a reasonably diligent search, the library is unable to locate the copyright owner. If the owner can be located, reproduction without permission would be prohibited. To some extent, libraries may already have such rights under section 107.

Interlibrary Loan

The Copyright Act specifically authorizes the provision of photocopies in lieu of interlibrary loans for single photocopies of articles from periodicals or collections, or of small parts of other copyrighted works without copyright liability. This right is limited, however, by complicated language reflecting a carefully drawn congressional compromise. One half of the compromise is a provision stating that the right does not extend to the "systematic" reproduction and distribution of copies. The other half is a proviso making it clear that an activity will not be considered "systematic" as long as the library or archives receiving the reproductions does not do so in such "aggregate quantities as to substitute for a subscription to or purchase of [the] work."

Prior to the enactment of the 1976 Copyright Act, library and publisher organizations developed a set of guidelines to assist in interpreting the quoted language

of the proviso. These guidelines were negotiated with the assistance of the National Commission on New Technological Uses of Copyrighted Works (CONTU), and were incorporated into the congressional conference committee report on the Act. (U.S. House of Representatives Conference Report No. 94-1733, pp. 72-73.) The CONTU guidelines give the following interpretation: with respect to a periodical (not a given issue of a periodical), the language of the proviso means filling a request of a library or archives within any calendar year for six or more copies of articles published in the periodical within five years prior to the date of the request (periodical articles that are more than five years old were generally considered to be so infrequently requested that they are not covered by the guidelines); with respect to all other material, the language of the proviso means filling requests of a single requesting entity within any calendar year for six or more copies of any given copyrighted work.

Some claim that where libraries provide a copy of a work instead of lending the work itself, the term "loan" is imprecise and the term "republishing" is appropriate. It is not, because the law recognizes that photocopies may be provided in lieu of interlibrary loans. In the typical case, the provision of the photocopy serves exactly the same purpose as a loan of the work itself, and simply reduces the risk of loss or damage in transit and reduces the transaction cost.

Reserve Rooms

While the Copyright Act does not specifically address copying for reserve room use, libraries may make single or multiple copies of copyrighted works at the request of faculty members under appropriate circumstances. These circumstances are more fully described in the ARL document "Reproduction of Copyrighted Materials for Classroom Use: A Briefing Paper for Teaching Faculty and Administrators," which accompanies this paper.

The New York University Settlement

In settling the suit brought against it by several publishers, NYU agreed to abide by the 1976 Classroom Guidelines. The suit did not explicitly address any library photocopying issues, but there may be implications for libraries, because the reserve room may be considered an extension of the classroom. The minimum standards in the Classroom Guidelines are in many respects unsuitable in higher education, as discussed in the ARL briefing paper for teaching faculty and administrators.

Attachment 2

GUIDELINES FOR PHOTOCOPYING

FOR TEACHING AND RESEARCH

February 15, 1978
Revised April 1983

by

OFFICE OF ADMINISTRATIVE LEGAL SERVICES
University of Wisconsin-Madison

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BEST COPY AVAILABLE

GUIDELINES FOR PHOTOCOPYING FOR TEACHING AND RESEARCH

A. INTRODUCTION

A new, complex U. S. copyright law went into effect on January 1, 1978. One portion of the new law authorizes teachers to reproduce some copyrighted works without paying royalties or securing permission. However, that part is expressed in such general terms that more explicit guidance is needed. These guidelines are intended to afford that assistance.

B. COPYING WHICH IS COMPLETELY UNRESTRICTED

1. Published Works Which Were Never Copyrighted

Anyone may reproduce without restriction works which were never copyrighted.

To determine whether an item has been copyrighted, look at the front pages of the book or periodical for a copyright notice. It consists of the copyright symbol (a letter "c" in a circle, the word "Copyright," or the abbreviation "Copr."), plus the year of first publication and the name of the owner of the copyright. Writings published prior to January 1, 1978 without copyright notices are not protected. "Notice" requirements for works published after that date have been relaxed somewhat with respect to both the position of notices and inadvertent omission of them, so there may be limited protection for some works on which notices do not appear. However, in such instances copiers will not be liable for infringement who did not learn in some other way, prior to copying, that the works were actually copyrighted despite the lack of notices on them.

2. Published Works Whose Copyrights Have Expired

Anyone may reproduce without constraint published works whose copyrights have expired.

All copyrights dated earlier than 1906 have expired. Copyrights dated 1906 or later may have expired because the initial period of copyright protection is for 28 years. We recommend that copiers either assume the protection is still in effect for copyrights dated in 1906 or later, or ask the owners of them (or the U. S. Copyright Office) whether they are still subject to copyright protection. Usually publishers are either the owners or know the owners' locations. If not, owners can be located through the U. S. Copyright Office in Washington, D.C.

3. U. S. Government Publications

U. S. Government publications may be copied freely because they are not copyrightable. This classification consists of documents prepared by an officer or employe of the U. S. Government as part of that person's official duties. It does not extend to documents published by others with the support of U. S. Government grants or contracts. Such items may or may not be copyrighted and teachers should look at the front pages to see if they bear a copyright notice.

C. COPYING WHICH IS PERMITTED

Teachers may reproduce copyrighted works for classroom use and for research without securing permission and without paying royalties when the circumstances amount to what the law calls "fair use." It is generally fair use for teachers to

BEST COPY AVAILABLE

copy supplementary items for such purposes as filling in missing information or for bringing materials up to date; but fair use is a multi-faceted concept. Courts have not yet interpreted the law, and there is a lively dispute as to the extent of permissible copying, particularly for classroom use. The spirit and letter of these guidelines should be observed.

1. Single Copies

For teaching, including preparation, and for scholarly research, a teacher may make, or have made, a single copy of:

a. a chapter from a book;
b. an article from a journal, periodical or newspaper;
c. a short story, essay or poem;
d. a diagram or picture in any of those works.

2. Multiple Copies

For one-time distribution in class to students, a teacher may make, or have made, multiple copies if he or she:

a. makes no more than one for each student; and
b. includes the notice of copyright (writes it on the first sheet or copies the page on which it appears); and
c. is selective and sparing in choosing poetry, prose and illustrations; and
d. makes no charge to the student beyond the actual cost of the photocopying.

The right to make multiple copies is strengthened if the copying will not have a significant effect upon the potential market for the work (this is probably the most important factor), or if there is insufficient time to seek permission from the owner of the copyright.

D. COPYING FOR WHICH TEACHERS SHOULD OBTAIN PERMISSION

1. Repetitive Copying

The "fair use" justification is weakened in the case of photocopying on a repetitive basis for continued use in successive terms.

2. Copying for Profit

Fair use extends only to nonprofit copying. Teachers should not charge students more than the actual cost of photocopying, and should not make copies for students who are not in their own classes, without obtaining permission. Publishers have recognized that fair use extends to classroom copies made and distributed by a commercial copy center.

3. Unpublished Works

One should obtain permission from owners of unpublished works in order to copy from them. The law gives automatic copyright protection to unpublished works from the time they are created until they are published.

4. Consumable Works

Teachers need to secure permission before making multiple copies of copyrighted works which are intended to be consumed in classroom activities such as workbooks, exercises, and standardized tests and their answers.

5. Copying According to an Overall Plan

Teachers may make fair use of copyrighted works if they photocopy upon their own initiative. In most instances it is not fair use to copy according to a plan designed by supervisors, which usually means administrators in the University context.

E. PUBLISHERS' GUIDELINES - MULTIPLE COPIES FOR CLASSROOM USE

The Association of American Publishers asserts that the fair use exception is narrower than the guidelines discussed above. Several copyright infringement suits have been settled based on guidelines developed by the Ad Hoc Committee on Copyright Law Revision. The AAP and others have sued several professors and a university for copyright infringement based on these guidelines. This case was settled with the university agreeing to follow the guidelines below, unless the university's attorney advised that the proposed copying constituted fair use. We believe the Ad Hoc Committee guidelines provide for only the minimum level of copying permitted by the law and that the fair use exception permits copying as described in C above. We recommend following the American Library Association guidelines circulated with a March 7, 1983 memo to Deans, Directors and Department chairs. The Ad Hoc Committee guidelines are as follows:

II. *Multiple Copies for Classroom Use*

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion: *provided that:*

A. The copying meets the tests of brevity and spontaneity as defined below; *and*,

B. Meets the cumulative effect test as defined below; *and*.

C. Each copy includes a notice of copyright

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. *Prohibitions as to I and II Above*

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed MARCH 19, 1976.

Ad Hoc Committee on Copyright Law Revision:
By SHELDON ELLIOTT STEINBACH.

Author-Publisher Group:
Authors League of America:
By IRWIN KARP, *Counsel.*

Association of American Publishers, Inc.:
By ALEXANDER C. HOFFMAN,
Chairman, Copyright Committee.

F. HOW TO OBTAIN PERMISSION

(We are indebted to the Association of American Publishers for this material on how to obtain permission which is quoted from its booklet, Explaining the New Copyright Law.)

"...One of the most frequent reasons cited by permissions departments for delays in answering requests...is incomplete or inaccurate information contained in requests. A survey of permissions...conducted by the AAP determined that the following facts are necessary in order to authorize duplication of copyrighted materials.

"1. Title, author and/or editor, and edition of materials to be duplicated
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material
3. Number of copies to be made
4. Use to be made of duplicated materials (and duration)
5. Form of distribution (classroom, newsletter, etc.)
6. Whether or not the material is to be sold
7. Type of reprint (ditto, photography, offset, typeset)

. . . .

"The request should be sent, together with a self-addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be readily obtained in the publication entitled THE LITERARY MARKETPLACE, published by the R. R. Bowker Company and available in all libraries.

"Because each request must be checked closely by the publisher, it is advisable to allow adequate lead time to obtain the permission before the materials are needed. Granting of a permission to duplicate is not simply a 'yes' or 'no' matter. (Although many publishers have a minimum or no-charge policy for such uses by noncommercial organizations, they must first review the status of the copyright to see if the power to grant duplication rights of this nature is within their scope or province.) Each such request requires a careful checking of the status of the copyright, determination of exact materials

to be duplicated (which sometimes involves ordering a copy of the material from a warehouse), and assignment of author's royalties if fees are involved. Some helpful hints from those involved daily in the processing of permission include:

"1. Request all permissions for a specific project at the same time
2. Don't ask for a blanket permission--it cannot, in most cases, be granted
3. Send a photocopy of the copyright page and the page or pages on which permission is requested
4. Make sure to include a return address in your request."

SAMPLE LETTER REQUESTING PERMISSION TO COPY BEYOND FAIR USE

February 15, 1983

Permissions Department
Hypothetical Book Company
200 Blueridge Parkway
Boston, Mass. 02106

Dear Staff:

I would like permission to copy the following for continued use in my classes in future semesters:

Title: Social Conditions, Second Edition
Copyright: Hypothetical Book Co., 1965, 1971
Author: Jane Hansen
Material to be duplicated: Chapters 10, 11 and 14 (photocopy enclosed).
Number of copies: 500
Distribution: The material will be distributed to students in my classes and they will pay only the cost of the photocopying
Type of reprint: Photocopy
Use: The chapter will be used as supplementary teaching material.

Sincerely,

May Hong, Professor

G. INFRINGEMENT

Because of the vagueness in the "fair use" provisions in the new act, it is possible that teachers may innocently infringe upon copyrights through photocopying.

Owners of copyrights can attempt to halt infringement by suing for injunctions, and can seek to recoup their actual market losses by claiming money damages. Where there are only nominal monetary losses, owners can instead of seeking their actual damages, claim "statutory" damages up to $10,000 (or up to $50,000 if the infringement was "willful").

While photocopying by a teacher may result in an infringement, it should not produce an actual monetary loss of consequence if the teacher attempts to limit his or her copying to fair use. Good faith exercise of that right precludes copying in quantities which are likely to be large enough to seriously affect the potential market for a work. However, a court's determination that an infringement has occurred, will, even in the absence of actual or statutory damages, probably result in an order that the offending copying should cease. Such an order is called an injunction.

Even if teachers' copying is held to infringe, the new act exempts them from "statutory" damages and limits their exposure to actual damages, if they believed their copying was fair use and they had reasonable grounds for that belief. Adhering to the guidelines in C above should afford reasonable grounds for believing one is engaging in fair use; and, as noted above, a good faith attempt at fair use is unlikely to result in significant actual damages.

If a defendant in an infringement suit is a University employe who photocopied in the course of his or her employment, then Wisconsin law provides that the lawyers on the staff of the Attorney General will defend that employe without charge and that the State will pay the court costs and damages, if there are any.

H. CONTACT THE LEGAL STAFF FOR ASSISTANCE

As you can see from these guidelines, the new Copyright Law is an extremely complex document - one which will be subject to a wide variety of interpretations. Because the statute has a significant effect upon the University's teaching, research, and service programs, it is important that the campus understand the letter and spirit of the law. If you have further questions or would like advice on specific aspects of the law as they may apply to your area of responsibility, please call the Office of Administrative Legal Services, 263-7400.

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University of Wisconsin Madison

OFFICE OF ADMINISTRATIVE LEGAL SERVICES
361 Bascom Hall / 500 Lincoln Drive / Madison, Wisconsin 53706 / (608) 263-7400

March 7, 1983

MEMORANDUM

TO: Deans, Directors, Department Chairpersons

FROM: Gail S. Kalson, Office of Administrative Legal Services

RE: Guidelines for Multiple Copy Reproduction of Copyrighted Materials for Classroom Use

Recent litigation has focused on the application of the Fair Use provisions in the copyright law to reproduction of copyrighted materials for classroom use. This memo is being sent so that you have available and can make sure all teaching staff are informed about the provisions of the copyright law as they pertain to classroom copying of copyrighted materials.

I. The Copyright Law

Under the copyright law the copyright owner has the exclusive right to reproduce and distribute the work. The "Fair Use exception" permits copying without the copyright owner's permission for purposes such as criticism, comment, teaching, scholarship or research.

In determining whether the use is a "fair use" the law requires consideration of the following factors: 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2. the nature of the copyrighted work; 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4. the effect of the use upon the potential market for or value of the copyrighted work. (17 U.S.C. sec. 107)

The determination of fair use is made on a case-by-case basis. It is important to note that the law applies even to material distributed free to the students. It holds the course instructor responsible if the copying is done at his or her request, even if it is an outside copy center that reproduces and distributes the work. The University's own policy is that teaching staff are expected to secure permission from the copyright owners unless the intended use clearly is permissible under the "fair use" exception.

II. Permissible Copying

The American Library Association has developed model guidelines for classroom, research and library use of copyrighted materials. We believe they provide a realistic approach to the University's need to disseminate meaningful and current information in its instructional program. These ALA guidelines are attached; they also contain a sample letter for requesting permission to copy and a summary of infringement remedies available to the copyright owner.

As yet, no court cases have interpreted the Fair Use exception in the University context. Despite the availability of the ALA guidelines no automatic formula determines whether a use is a fair use. However, we believe you would be in compliance with the law if: 1) the materials are not used repeatedly; that is, you have not used them in preceeding classes and you do not intend to use them in subsequent classes; 2) no more than one copy is made for each student; 3) the notice of copyright is included on each copy distributed; 4) the students are not assessed a fee beyond the actual cost of reproduction; and 5) in the case of longer materials and books, the portion copied is selective and sparing in comparison to the whole of the work.

The right to make multiple copies is weakened if there is any reason to believe that the copying will directly affect the potential market for the work or if copying was done without permission when the decision to copy was made with sufficient lead time to request permission. This does not mean however that an instructor has free license to copy what he/she wishes if the decision is made the week before classes.

III. Publisher Recognized Guidelines

A congressionally-approved agreement between representatives of publisher's associations and educational institutions accepts the points listed above, but also urges use of a quantitative standard. It argues that "fair use" should not permit the copying of any poem longer than 250 words or the copying, in full, of any prose work longer than 2500 words (although 10% of any longer prose work could be copied up to a maximum of 1000 words). The Agreement would also insist that not more than one photo or diagram should be copied from any single book or periodical, that the decision to copy be a spontaneous one, and that no anthologies or collective works be created by means of copying. A spontaneous decision would be made for example where an article, etc., has just appeared in a journal and it related to subject matter being covered in a course. The publishers are using these standards in arguing their current case against New York University and several of its professors. Publishers have raised particular concern about the creation of anthologies which use copyrighted material without permission in order to produce a volume used as a textbook or class reader. One court has found the Agreement "instructive" in a case dealing with the distribution of copies of a copyrighted work in a secondary school classroom.

IV. Recommended Procedures for Multiple Copying for Classroom Use

In the absence of any satisfactory definition of "fair use" by court test or law, individual judgment must be exercised. We have copies of the Agreement prescribed above if you wish to see them, but on balance we believe the American Library Association guidelines provide a more realistic approach in the university context.

The ALA advises faculty to be "selective and sparing" in copying, but to reject for university situations the arbitrary limits proposed by the publishers. In our view, UW-Madison staff will be complying with the law if they follow carefully the ALA guidelines.

If you have any questions regarding the "fair use" exception, please call Gail Kalson at the Office of Administrative Legal Services, 263-7400.

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